D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 2-B) (Phase 4-B)

Consolidated Petitions of New England Telephone and Telegraph Company d/b/a NYNEX, Teleport Communications Group, Inc., Brooks Fiber Communications, AT&T Communications of New England, Inc., MCI Communications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between NYNEX and the aforementioned companies.

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I. INTRODUCTION

This is an arbitration proceeding being held pursuant to the Telecommunications Act of 1996 ("the Act'). On December 3, 1996, the Department issued an order in this proceeding ("Phase 2 Order") which set forth our rulings with regard to the method to be used by New England Telephone and Telegraph Company, d/b/a NYNEX ("NYNEX") in carrying out the avoided cost study for determination of the wholesale discount to be applied to the resale of telecommunications services. The methodology employed by the Department was the one set forth by the Federal Communications Commission ("FCC") in its First Report and Order dated August 8, 1996 ("Local Competition Order"). On February 5, 1997, in response to motions for clarification and reconsideration, the Department issued a second order ("Phase 2-A Order") with regard to the avoided cost study and directed NYNEX to submit a cost study in compliance with that order. NYNEX submitted its compliance filing to the Department on February 14, 1997.

On December 4, 1996, the Department issued another order in this proceeding ("Phase 4 Order") which set forth our rulings with regard to the method to be used by NYNEX in carrying out total element long-run incremental cost ("TELRIC") studies to determine the prices to be charged by NYNEX to competing local exchange carriers for the use of unbundled network elements. The methodology employed by the Department was the one set forth by the FCC in the Local Competition Order. On February 5, 1997, in response to motions for clarification, recalculation, and reconsideration, the Department issued a second order ("Phase 4-A Order") with regard to the TELRIC studies and directed NYNEX to submit cost studies in compliance with that order. NYNEX submitted its compliance filing with the Department on February 14,

1997. On March 14, 1997, NYNEX filed revisions to its compliance filing, correcting an error in the calculation of the rates for tandem interconnection.

A procedural conference with the parties was held on February 10, 1997, and an evidentiary hearing on the compliance filings was held on February 25, 1997. Following questioning of NYNEX's witnesses, the competing carriers in the proceeding were given the opportunity to submit briefs by March 4, 1997, on any portions of the compliance filing that they felt were inappropriately carried out by NYNEX, and NYNEX was given an opportunity to respond by March 11, 1997. By oral notice, parties were also given ten days to submit any comments on NYNEX's March 14 revisions, and on March 24, 1997, Teleport Communications Group Inc. ("TCG") filed a Motion to Strike ("TCG Motion") NYNEX's revisions. On March 31, 1997, NYNEX filed a response to TCG's Motion to Strike. On March 31, 1997, the arbitrator announced that the record would be reopened to accept new information from NYNEX for consideration of NYNEX's March 14, 1997, compliance filing revisions. A hearing is scheduled for May 12, 1997, to review the new information.

On March 3, 1997, TCG filed a brief ("TCG Brief") concerning the applicability of NYNEX's proposed mutual compensation rates for transport and termination. On March 11, 1997, NYNEX filed a response ("NYNEX Brief") to the TCG brief. On March 18, 1997, both TCG and AT&T Communication of New England, Inc. ("AT&T") filed briefs ("TCG Reply", and "AT&T Reply" respectively) in reply to the NYNEX brief, and on March 25, 1997, NYNEX submitted a final brief ("NYNEX Reply") in reply to the TCG and AT&T statements.

This order deals with the sufficiency of NYNEX's compliance filings, excluding NYNEX's

tandem interconnection rate revisions, and with the issue of the applicability of transport and termination charges. TCG requested that the Department rule immediately on the compliance filings exclusive of the tandem rate revisions, rather than wait until hearings are concluded on the revisions, because our determination on these other issues will be helpful to the parties in concluding interconnection agreements.

II. THE COMPLIANCE FILINGS

The Department has reviewed the avoided cost study and the TELRIC studies submitted by NYNEX in response to our Phase 2 Order, Phase 2-A Order, Phase 4 Order, and Phase 4-A Order (NYNEX Compliance Exhibit 1). We have also reviewed the testimony of NYNEX's witnesses in support of those compliance filings. Tr. 12, at 7-18. With the exception of NYNEX's revised tandem interconnection rates, no party has objected to the manner in which NYNEX has carried out either the avoided cost study or the TELRIC studies. Accordingly, we find that NYNEX has accurately and completely met the requirements we have set forth in our orders, and we therefore approve those compliance filings, excluding revisions, as submitted to the Department. The Department will address the revisions following the hearing scheduled for May 12, 1997.

III. RATES FOR TRANSPORT AND TERMINATION

A. Introduction

As noted, no party disputes the numerical values of transport and termination charges developed by NYNEX in its TELRIC studies. Rather, the issue in dispute concerns the applicability of NYNEX's proposed rates for transport and termination. Two options are

presented by the parties. Under NYNEX's proposal, these charges would apply only to calls that would be rated as "local" calls if they originated and were terminated between two NYNEX customers, and other calls would be considered "toll" calls and would be charged access charges under NYNEX Massachusetts Tariff No. 15. Under the TCG and AT&T proposal, the transport and termination charges would apply to all intraLATA calls that originate on a competing carrier's network facilities and that terminate on NYNEX facilities, regardless of where the calls originated. We now turn to a more detailed review of the parties' positions.

B. Positions of the Parties

1. TCG

TCG argues that NYNEX has taken an inappropriately narrow view of the applicability of the transport and termination charges and asks the Department to broaden that applicability (TCG Brief at 1). TCG argues that NYNEX's attempt to restrict the application of rates for transport and termination to what it considers to be local calls flies in the face of the Act and cannot be considered proper (id. at 3). It states that access charges should only apply where three carriers are involved in completing a call, the originating local exchange carrier ("LEC"), an interexchange carrier ("IXC"), and the terminating LEC (id.). In this case, notes TCG, two LECs collaborate to complete a call, and all intraLATA calls should be considered local (id.).

TCG states that the FCC affirmed the power of state public utility commissions to determine which geographic areas should be considered local areas for the purpose of applying reciprocal compensation obligations (id. at 4). TCG argues that NYNEX's narrow definition of local is not based on any difference to NYNEX in the cost of transporting or terminating local or

toll traffic; neither is it based on any technical difference in the handling of such calls (TCG Reply at 4-5). As a matter of economic efficiency, says TCG, where costs are equal, rates and charges should also be equal (TCG Brief at 7). TCG asserts that NYNEX's interpretation has an anticompetitive effect in that it allows NYNEX to dictate local calling areas for its competitors (id. at 6). This latter point is so, states TCG, because it will be forced to terminate calls to NYNEX which TCG rates as "local" to its customers, at the rate NYNEX charges for "toll" call termination (id.). The result will be a price squeeze on TCG that will force TCG to offer calling plans to customers which are identical to those offered by NYNEX (id.). TCG argues that such a result will retard the development of facilities-based local exchange competition by denying a facilities-based competitor the benefit of its own facilities (id.).

For all of these reasons, TCG states that it should be permitted to terminate all traffic originated in the LATA to NYNEX at the TELRIC rate established in this proceeding (id. at 11).

2. AT&T

AT&T argues that, as a general policy matter, prices and rates should be based upon cost (AT&T Brief at 1). It states that a LEC's cost of terminating traffic does not depend upon whether the traffic originated as local or toll traffic, neither should the rate it charges (id.). AT&T recognizes that current rates do not always reflect this correspondence between costs, and it therefore argues that, until they do, a competing carrier should be able to define its local calling area for the purpose of determining whether mutual compensation rates or traditional switched access rates apply (id. at 1-2).

3. NYNEX

As noted above, NYNEX states that TELRIC-based rates apply only to the transport and termination of local calls between exchange carriers and that local calls should be defined as in NYNEX's Massachusetts Tariff No. 10 (NYNEX Brief at 2). For calls that would be toll calls under NYNEX's tariff, access charges contained in Massachusetts Tariff No. 15 should apply for NYNEX's transport and termination of such calls (id.). NYNEX posits that there is currently no other basis for distinguishing uniformly among all carriers between local calls and interexchange calls than the framework of NYNEX's existing tariff (id. at 6-7). It argues that TCG's alternative approach to the charges for intraLATA calls is incorrect and in conflict with the Local Competition Order, stating that the FCC considered this precise issue and determined that transport and termination charges apply solely to local calls (id.). TCG's position, says NYNEX, would "eviscerate" the FCC's directive that determination of local calling areas be made "consistent with state commissions' historical practice of defining local service areas for wireline LECs" (id. at 7). NYNEX also asserts that TCG is being disingenuous in claiming surprise with NYNEX's position and in raising this issue at this late date in the arbitration proceeding (id. at 8). TCG's position, argues NYNEX, raises a host of policy issues with far-reaching consequences that go well beyond the scope of this arbitration (id. at 10).

C. Analysis and Findings

The parties are in agreement that the Department has the authority to determine what geographic areas should be considered local areas for the purpose of applying reciprocal compensation agreements under Section 251(b)(5) of the Act. The FCC stated: "We conclude that section 251(b)(5) reciprocal compensation obligations should apply only to traffic that

originates and terminates within a local area." Local Competition Order at 1034. It then went on to define that local area, stating:

> [S]tate commissions have the authority to determine what geographic areas should be considered `local areas' for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LEC's. Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges. We expect the states to determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local service areas are not the same, should be governed by section 251(b)(5)'s reciprocal compensation obligation or whether intrastate access charges should apply to the portions of the local service areas that are different. Local Competition Order at 1035.

The FCC reached this conclusion, having also considered the very types of cost and technical issues raised by TCG and AT&T in this arbitration, noting:

> We recognize that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions. Ultimately, we believe that the rates that local carriers impose for transport and termination of local traffic and for the transport and termination of long distance traffic should converge. We conclude, however, as a legal matter, that transport and termination of local traffic are different services than access for long distance telecommunications. Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 252(d)(2), while access charges for interstate long-distance traffic are governed by sections 201 and 202 of the Act. The Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for long-distance traffic. Local Competition Order at 1033.

Accordingly, we find that the issue is jurisdictional to the Department. We now turn to the question of whether this arbitration is the appropriate forum for the remedy sought by TCG and AT&T. We conclude that it is not.

If NYNEX is arguing in its brief that the FCC's phrase "consistent with the state commissions' historical practice of defining local service areas for wireline LEC's" implies that

such services areas must be held immutable as competitive forces infuse the local exchange marketplace, we disagree. We do, however, agree with NYNEX that changing those local calling areas is an issue of great complexity, with ramifications beyond this arbitration proceeding. This is a policy issue that must be viewed in a broader forum than this kind of arbitration, such as in New England Telephone and Telegraph, ("NET"), D.P.U. 89-300, at 52-73 (1990), where the Department considered the primary calling area ("PCA") issue on a comprehensive, state-wide basis and developed the existing PCA framework.[1]

We reach this conclusion notwithstanding TCG's thoughtful arguments about the potential competitive inefficiencies that might result from continued reliance on existing local calling areas. We are cognizant that, at any moment in time, local calling areas, which have resulted from a variety of historical forces, might not necessarily correlate with current communities of interest.[2] Accordingly, we have reviewed those calling areas from time to time in response to a variety of public policy concerns, either on a generic basis, as in NET, D.P.U. 89-300, above, or in response to the concerns of a particular part of the state. See, for example, Petition of Charlton Board of Selectmen, D.P.U. 95-88 (1997). TCG has raised important issues that could be considered in the course of such local calling area proceedings. However, this arbitration proceeding is not designed to handle such extensive public policy reviews, or provide a broad opportunity for public comment and intervention by affected parties.

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[1] The Supreme Judicial Court has also addressed the PCA issue and held that the Department's determination of that issue was not arbitrary and capricious simply because a PCA resulted in perceived inequities. Bosley v. Department of Public Utilities, 417 Mass. 510, 513 (1994).

[2] We understand, too, that the community of interest of customers solicited and acquired by TCG might be different from the more widespread monopoly-service-based community of interest employed in recent determinations of NYNEX's local calling areas.

In summary, it is clearly established in the Act that NYNEX must offer its services to competitive carriers, either as resold bundled service offerings or as unbundled network elements. Competitive carriers, for their part, are granted discretion to market those services, with or without their own facilities-based services, in whatever form they deem appropriate. Thus, TCG is free to establish whatever local calling area it wants, but we will not permit it to use an interconnection agreement arbitration proceeding under the Act to have us require NYNEX to change its local calling areas, either for TCG alone or for the variety of local calling areas that might be desired by each possible competitor. Accordingly, the reciprocal compensation arrangement for terminating and transporting calls will be based on existing NYNEX tariffs, in this case, the ones defining local calling areas and those defining the applicability of intraLATA toll access charges.

We therefore find that NYNEX's determination of the applicability of the transport and termination charges developed in the TELRIC model is correct, and TCG's and AT&T's request for a broader application of these charges to all intraLATA calls is denied.

IV. ORDER

After due notice, hearing and consideration, it is

ORDERED: That the issues under consideration in this Phase 2-B, Phase 4-B Order be determined as set forth above; and it is

FURTHER ORDERED: That the filing submitted by New England Telephone and Telegraph d/b/a NYNEX on February 14, 1997, excluding the revisions filed on March 14, 1997, is hereby approved.

By Order of the Department,

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John B. Howe, Chairman

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Janet Gail Besser, Commissioner